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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 MICHAEL BRUCE BYNOE,

10 Petitioner,

Case No. 3:07-cv-00009-LRH-CLB

11 ORDER

12 v.

13 HELLING, et al.,

14 Respondents.

15 Michael Bruce Bynoe has filed a motion to withdraw his motion for stay and a  
16 motion for leave to file a second-amended § 2254 habeas corpus petition, with an  
17 attached proposed petition (ECF Nos. 87, 87-1, 94).

18 Turning first to the issue of a stay and abeyance, Bynoe filed a motion seeking to  
19 stay these federal proceedings pending additional state-court litigation (ECF No. 83).  
20 Subsequently, in December 2021, he filed a motion to withdraw the motion to stay,  
21 explaining that the Nevada Supreme Court had resolved the relevant state  
22 postconviction litigation (ECF No. 94). Good cause appearing, the motion to withdraw  
23 the motion to stay is granted.

24 Next, with respect to the motion for leave to amend, respondents opposed, and  
25 Bynoe replied (ECF Nos. 91, 93). Under Federal Rule of Civil Procedure 15(a)(2), a  
26 party may amend a pleading with the court's leave. "The court should freely give leave  
27 when justice so requires." Fed. R. Civ. P. 15(a)(2). "Rule 15's policy of favoring  
28 amendments to pleadings should be applied with extreme liberality." *United States v.*

1 *Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (internal quotations omitted). Although leave to  
 2 amend is within the discretion of the district court, the decision “should be guided by the  
 3 underlying purpose of Rule 15(a) . . . which was to facilitate decisions on the merits,  
 4 rather than on technicalities or pleadings.” *In re Morris*, 363 F.3d 891, 894 (9th Cir.  
 5 2004) (internal quotations omitted). When deciding whether to grant leave, a court may  
 6 “take into consideration such factors as bad faith, undue delay, prejudice to the  
 7 opposing party, futility of the amendment, and whether the party has previously  
 8 amended his pleadings.” *Id.* Futility of amendment can alone justify denying a motion for  
 9 leave to amend. *Bonin v. Calderon*, 59 F.3d 815, 845 (9<sup>th</sup> Cir. 1995).

10 Bynoe argues that the primary purpose of amendment is to provide various  
 11 updates such as the current procedural posture of this case on remand from the Ninth  
 12 Circuit Court of Appeals (ECF No. 87, p. 2). He further urges that the proposed second-  
 13 amended petition is a streamlined, clearer petition, and he does not seek leave to  
 14 amend out of bad faith or to cause undue delay.<sup>1</sup> He also contends that arguments  
 15 regarding futility are premature.

16 Respondents argue that allowing Bynoe to amend his pleading would exceed the  
 17 scope of remand (ECF No. 91, p. 3). This court had denied a motion to stay and  
 18 dismissed Bynoe’s wholly unexhausted petition without prejudice because at that time a  
 19 petition containing only unexhausted claims was not eligible for the stay and abey-  
 20 procedure outlined in *Rhines v. Weber*, 544 U.S. 269 (2005) ECF No. 41). In February  
 21 2016, the Ninth Circuit held in *Mena v. Long* that the *Rhines* stay-and-abey procedure is  
 22 not limited to mixed petitions and held that a district court may exercise its discretion to  
 23 stay a petition that raises only unexhausted claims. 813 F.3d at 912. In September  
 24 2016, Bynoe filed a motion for relief from judgment in light of the *Mena* decision (ECF  
 25 No. 52). This court concluded that Bynoe failed to demonstrate that extraordinary  
 26 circumstances warranted relief from judgment and denied the motion (ECF No. 65).

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 28 <sup>1</sup> The first-amended petition is 45 pages, and the proposed second-amended petition is 14 pages  
 (ECF Nos. 17 and 87-1).

1 Bynoe appealed, and in July 2020, the Ninth Circuit reversed and remanded (see ECF  
 2 No. 74). The court of appeals directed that on remand Bynoe may request that this court  
 3 stay his petition under *Rhines* and *Mena* while he returns to state court to exhaust his  
 4 federal constitutional claims.

5 This court disagrees that the Ninth Circuit mandate, which only explicitly addresses  
 6 a motion to stay, forecloses amendment here. See *U.S. v. Kellington*, 217 F.3d 1084,  
 7 1092 (9<sup>th</sup> Cir. 2000) (“According to the rule of mandate, although lower courts are obliged  
 8 to execute the terms of a mandate, they are free as to anything not foreclosed by the  
 9 mandate.”) (internal quotations omitted); see also *In re Sanford Fork & Tool Co.*, 160 U.S.  
 10 247, 256 (1895). In the interests of justice, the motion for leave to file a second-amended  
 11 petition is granted. The court expresses no views on the timeliness of any claims or any  
 12 other possible applicable procedural bars.

13 Bynoe has also filed a motion for leave to file certain exhibits under seal (ECF No.  
 14 86). While there is a presumption favoring public access to judicial filings and documents,  
 15 see *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), a party seeking to  
 16 seal a judicial record may overcome the presumption by demonstrating “compelling  
 17 reasons” that outweigh the public policies favoring disclosure, *Kamakana v. City and*  
 18 *County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations omitted). In general,  
 19 “compelling reasons” exist where the records may be used for improper purposes. *Id.* at  
 20 1179 (citing *Nixon*, 435 U.S. at 598). Here, Bynoe asks to file under seal his Nevada  
 21 Department of Corrections medical records. Good cause appearing, the motion is  
 22 granted.

23 **IT IS THEREFORE ORDERED** that petitioner’s motion to withdraw motion for stay  
 24 ECF No. 94) is **GRANTED**. The motion to stay case (ECF No. 83) is withdrawn.

25 **IT IS FURTHER ORDERED** that petitioner’s motion for leave to file a second-  
 26 amended petition (ECF No. 87) is **GRANTED**.

27 **IT IS FURTHER ORDERED** that the Clerk of Court **detach** and **file** the second-  
 28 amended petition at ECF No. 87-1.

1           **IT IS FURTHER ORDERED** that respondents have **60 days** from the date of this  
2 order to file a response to the second-amended petition.

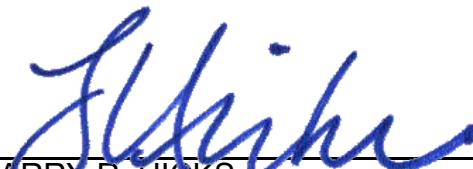
3           **IT IS FURTHER ORDERED** that petitioner has **45 days** from the date of  
4 respondents' response to file a response/opposition.

5           **IT IS FURTHER ORDERED** that petitioner's first and second motions for extension  
6 of time to file a motion to stay (ECF Nos. 81, 82) are both **DENIED** as moot.

7           **IT IS FURTHER ORDERED** that petitioner's motion for leave to file certain exhibits  
8 under seal (ECF No. 86) is **GRANTED**.

9           **IT IS FURTHER ORDERED** that respondents' first and second motion for  
10 extension of time to file a response to the motion to stay (ECF Nos. 89, 90) are both  
11 **DENIED** as moot.

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13           DATED: 16 February 2022.

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16           LARRY R. HICKS  
17           UNITED STATES DISTRICT JUDGE

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